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No. 95-1697

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

C. Keith Schafer, John Twichaus, Robert O. Muether, Jacqueline Howard, Kelly Shaw, and Peggy Dunlap, *Petitioners*,

v.

Wayne and Alice Kennedy, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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REPLY TO RESPONDENTS' REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The respondents base much of their argument against granting the writ on the fact that this a qualified immunity appeal, rather than an appeal after a finding of liability. But contrary to the respondents' assertion, that is an additional reason for the Court to grant the petition. If petitioners ultimately prevail, this Court will not have a later opportunity to stop the Eighth Circuit's erosion of the qualified immunity doctrine and the interference with the state's treatment of the mentally ill. As this Court has repeatedly recognized, most recently in *Behrens v. Pelletier*, ___ U.S. ___, 116 S. Ct. 834 (1996), it is essential that public officials retain the benefits of the qualified immunity doctrine -- among which is the assurance that they will not have to endure "the costs of trials or the burdens of broad-reaching discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The Eighth Circuit significantly undercut the qualified immunity doctrine when it held that the existence of a constructive-involuntary status should have been obvious to mental health professionals even though two of the four federal judges who analyzed the claim rejected it.

The issue here is not one that merely affects the burdens to be imposed on a few Missouri officials. Rather, the holding of the Eighth Circuit creates an incentive for states to change the way they allocate resources in treating the mentally ill. *See* Petition, 16-19. These changes could adversely affect the number of mentally ill persons treated by the state as well as the types of persons helped. Or states may feel compelled to release voluntary patients who may be dangerous to themselves or others in order to preserve the "voluntary status" and avoid resource-depleting judgments. It is true that petitioners might ultimately prevail at trial despite the Eighth Circuit's incorrect holding. But the court

of appeals' opinion has created a new risk of liability, one that would motivate states to change their policies in ways contrary to the ways the elected representatives of the people believe to be best.

Moreover, review should be granted at this time because of the troubling ramifications of the Eighth Circuit's reformulation of the qualified immunity doctrine. The district court and the Eighth Circuit dissenting judge both rejected the idea that a constructive-involuntary status can lead to the imposition of liability on state officials under the due process clause. Nevertheless, the two-judge majority on the panel would force state officials to lose the qualified immunity protection. They did not hold that this constructive-involuntary theory was "clearly established" -- the traditional test for qualified immunity, one repeatedly endorsed by this Court. Rather, they held that petitioners could be compelled to proceed through disruptive and time-consuming discovery and to trial merely because the panel's novel theory was "not obscure." 71 F.3d at 296; Petition, A-9. Even that conclusion was unwarranted, as shown by the failure of both the court of appeals in its decision and respondents in their brief to cite any decision in which qualified immunity was abrogated in a situation even close to this one.

Until now, it was clear in the Eighth Circuit, as elsewhere, that qualified immunity applies when the "legal norms the officials are alleged to have violated were not clearly established at the time." *Mitchell*, 472 U.S. at 526. The Eleventh Circuit has stated that "pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion . . . that what defendant is doing violates federal law in the circumstances." *Lassiter v. Alabama A & M University*, 28 F.3d 1146, 1148

(11th Cir. 1994). The Eighth Circuit's departure from these standards merits the attention of this Court.

2. Respondents largely ignore the main point of the petition. The Eighth Circuit has created a new status of patients who have substantive due process protections: persons who have attained a constructive or *de facto* involuntary status or who had only "effectively" become involuntary patients. Respondents address this point only briefly. They say that a new category of patients has not been created because the court must still determine that the mental patient was not free to leave the facility at the time of the harm (Brief in Opposition, at 7). This is a *non sequitur*. True, the trial court must still decide whether the decedent had, as a matter of fact, entered into this new status. If the Eighth Circuit's new version of the qualified immunity doctrine is accepted, and this case is allowed to proceed to trial, that will entitle the petitioners to a hearing before a decision on liability. But regardless of what may happen in this case, the respondents are unable to deny that the Eighth Circuit opinion creates a new category of patients: voluntary patients who had "effectively become" involuntary patients.

Of course, the issue before the trial court, if this case proceeds, would be a difficult one. The newly invented "effectively becomes" analysis turns on what state officials could have done, not what they did. The Eighth Circuit gave this directive: "On remand, it should be determined whether . . . Hawthorn *could* lawfully have detained her *if* either she

or her parents had requested her release." 71 F.3d at 295; Petition, A-7 (emphasis added).[1]

Respondents create the misimpression that the invocation of suicide precautions affects a patient's legal right to leave the facility (Brief in Opposition, at 2-3). Neither the statute they cite for this proposition nor any other Missouri or federal law creates such an effect. The limited right of the head of the facility to deny a request for release is the same on the first day of admission as it is when suicide precautions are in place or at any other time. Mo. Rev. Stat. § 632.155(2) [found in Petition, at 3]. The suicide precautions do not change the legal relationship.

Respondents also inaccurately describe petitioners' position. Petitioners do not argue that status upon admission is determinative. They instead take the position compelled by this Court's explanation for the voluntary/involuntary distinction, found in *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189 (1989), and *Youngberg v. Romeo*, 457 U.S. 307 (1982). It is when the state chooses to deprive someone of his or her liberty that the general rule (of no duty

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[1] The quoted passage immediately followed the portion of the opinion which referred to the issue of whether the mental health facility "had so restrained Kathleen's freedom to act on [her] own behalf . . . that the protections of the Due Process Clause . . . were triggered." 71 F.3d at 295, Petition, A-7 (interior quotations omitted). The juxtaposition of these statements shows that the Eighth Circuit was employing a "would have" test in determining whether freedom had been restrained. Thus, the opinion is not as narrow as respondents suggest (Brief in Opposition, at 7-8). Indeed, if the opinion were as narrow as respondents suggest, there would not have been a reversal because it was undisputed that state officials did not actually take any affirmative steps to restrain the patient.

to provide care to mentally ill) is abrogated. *DeShaney*, 489 U.S. 199-200; *Youngberg*, 457 U.S. at 315-16. Until a state takes action to restrain a person's liberty, it does not trigger the due process clause. It is not enough to say, as the Eighth Circuit does, that if state officials were faced with a certain scenario they would have or could have taken action to change a patient's status.

Respondents argue that a patient should not be considered voluntary if the patient does not have an immediate and absolute right to leave the facility. Even the very limited circumstances under which a voluntary patient can be temporarily detained are voluntary: the patient voluntarily agrees to those limitations upon being admitted. 71 F.3d at 294-95; Petition, A-6. Moreover, at least 42 other states expressly provide that a voluntary patient does not have an absolute right to release, and the other states have involuntary commitment statutes, which imply the same. *See* Petition, 11-12, 21. If those narrow limitations on an absolute right to leave a facility destroy the voluntary/involuntary distinction, the exception will have swallowed the rule.

3. The respondents are unable to rebut the point that the Eighth Circuit's approach creates a clear conflict with the First, Third, and Fifth circuits. *See* Petition, 10. These circuit opinions, cited by the Eighth Circuit itself, all adopted a standard of looking to a patient's actual status to determine whether the due process clause is implicated. *Monahan v. Dorchester Counseling Center, Inc.*, 961 F.2d 987 (1st Cir. 1992) (affirming dismissal based on fact that plaintiff's voluntary mental patient status meant that no duty existed); *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459 (3d Cir. 1990) (affirming summary judgment based on

voluntary status of mentally retarded resident); *Walton v. Alexander*, 44 F.3d 1297, 1306 (5th Cir. 1995) (en banc) (reversing denial of summary judgment motion by defendants; state had no duty to deaf child voluntarily placed in its custody). To preserve the involuntary/ voluntary distinction and for the benefit of the many states and their citizens that would be affected by its demise, the petition for writ of certiorari should be granted.

CONCLUSION

For the reasons stated above, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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